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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re DARRELL T., a Person Coming
Under the Juvenile Court Law.

B172762
(Los Angeles County
Super. Ct. No. CK 39234)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERNESTINE T., et al.,

Defendants and Appellants.

APPEALS from an order of the Superior Court of Los Angeles County.
Marilyn H. Mackel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed
and remanded with directions.

Joseph T. Tavano, under appointment by the Court of Appeal, for
Defendant and Appellant Ernestine T.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant
and Appellant Eddie T.

Larry Cory, Assistant County Counsel, and Arezoo Pichvai Tarkian,
Deputy County Counsel, for Plaintiff and Respondent.

Mother and father appeal from the order terminating their parental rights to Darrell. The parents contend that Los Angeles Department of Children and Family Services (“the Department”) did not comply with the notice requirements of the Indian Child Welfare Act (“ICWA”) (25 U.S.C. § 1901 et seq.) and that there was sufficient evidence of the exception to termination of parental rights set forth in Welfare and Institutions Code section¹ 366.26, subdivision (c)(1)(A). As the Department concedes ICWA notice was insufficient, we reverse and remand with directions.

FACTUAL AND PROCEDURAL SYNOPSIS

In September 1999, when Darrell was about two years old, he came to the attention of the Department after mother was rushed to the hospital as a result of overdosing on heroin. The Department took Darrell into protective custody and filed a section 300 petition on his behalf alleging mother was a frequent user of heroin and unable to provide care for Darrell and father’s whereabouts were unknown.

The court ordered Darrell placed in the home of a maternal cousin and ordered mother to participate in a drug program, random drug testing, parenting classes, and individual counseling. The court authorized monitored visits for the parents.

In October, the Department reported Darrell was at large with mother, who had taken him from his cousin. The cousin reported mother had a key to his residence and took Darrell at night while the cousin was sleeping. Mother called the cousin from an Indian reservation in Arizona but did not tell him where she was. Mother had a criminal record with several arrests for theft and burglary and an arrest for willful cruelty to a child: possible injury/death.

On October 27, the court issued a protective custody warrant for Darrell and an arrest warrant for mother. Mother appeared in court on November 8, and the court

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

recalled the warrants. Mother reported she had been arrested in October. The Department detained Darrell and placed him with M., his adult sibling.

In January 2000, the Department reported Darrell had left the home with father in December and Darrell's whereabouts were unknown. The court issued a protective custody warrant for Darrell. M. left a message for the social worker that she had recently moved, but did not leave an address or telephone number where she could be reached. The social worker contacted mother, who had been released from jail and was residing in Merced. Mother said M. had given Darrell to father, and father was living in Modesto. Mother did not have an address or telephone number for father. When mother was incarcerated, she called father and told him, "I'm busted [] and the baby needs you and [M.] has him." Mother admitted she had abused heroin since she was 15 years old and was currently enrolled in a drug program, but she was unable to provide the name of the program to the social worker.

On January 6, father contacted the social worker but failed to provide her with his address or telephone number. The social worker instructed father to bring Darrell back to Los Angeles, and father agreed but refused to give a date when that would occur.

In May, the court issued an arrest warrant for father. Father appeared in court on October 10 and claimed Darrell was with mother in a hotel in Sacramento. Counsel reported that father had recently rejoined mother and was not aware there was an open case pending for Darrell and that it was not clear to father that mother had wrongfully taken custody of Darrell. Father reassured the court he would take care of the situation. The court continued the matter to October 26 for father to return with Darrell and stated: "And if you haven't got the child, come back yourself because otherwise they are going to issue another warrant for you."

Father did not appear on October 26. The protective custody warrant remained in effect. The court issued an arrest warrant for father in November.

As of January 2001, the whereabouts of Darrell and his parents remained unknown. On February 22, the court sustained the petition, referred the matter to the child abduction unit, and ordered the case be set for disposition once Darrell was located.

In the interim, the social worker contacted Rich Bailey, the district attorney for Darrell's child abduction case in Sacramento. Bailey (and other district attorneys) opined mother had fled to the State of Washington and informed the social worker that mother was a hostile witness in a double homicide case in which her brother was a defendant and there were felony bench warrants for mother in Sacramento and Washington.

In April 2002, Darrell was found living with an adult brother in Oregon. Darrell was detained in Oregon, returned to California, and placed in foster care.

On April 16, father appeared in court and reported he and mother had been arrested in Florida for child stealing and he had been extradited to California. The court recalled the arrest warrant for father, but ordered the protective custody warrant issued for Darrell remain in full force and effect.

On May 24, mother and father were present in court under the custody of the Sheriff's Department.

On July 9, the court declared Darrell a dependent, ordered the Department to provide family reunification services, ordered mother attend a drug rehabilitation program with random testing, parenting classes, and individual counseling to address substance abuse, and ordered father to attend parenting classes and individual counseling to address case issues. The court authorized monitored visits for the parents.

In November, Darrell underwent a psychological evaluation by Dr. Rita Collins-Faulkner. Dr. Collins-Faulkner reported Darrell missed his parents, had a strong need to be with his parents and was sad about the separation from his parents.

In January 2003, the Department reported mother had been released from Merced County jail in November. The parents consistently visited Darrell, and the visits had gone well. Mother had participated in a parent-teacher conference. The foster mother

reported Darrell was bonded to his parents and often cried after the visits because he wanted to spend more time with them.

On February 7, the court issued a protective custody warrant for Darrell and arrest warrants for mother and father because mother had abducted Darrell from his preschool. Father appeared in custody in court on February 18 and stated he did not know the whereabouts of mother and Darrell. The foster mother had allowed the parents to have unmonitored visits and had not monitored the telephone contact between mother and Darrell. Mother was upset when the social worker informed her that future visits would be monitored by a foster family agency social worker. The paternal grandmother told the social worker mother had taken Darrell because he was to be adopted.

On March 12, the court found both parents had not complied with the case plan and terminated family reunification services and continued the matter for a section 366.26 hearing.

On July 8, mother appeared in court in custody. The court ordered a temporary commitment hold on mother and ordered mother not to have any contact with Darrell. Mother informed the bailiff of Darrell's whereabouts. Later that day, the social worker located Darrell at the home of his paternal aunt.

During an interview, mother reported she and Darrell stayed with friends in Wilmington and slept in the car. Mother admitted stealing and shoplifting to support Darrell. Mother stated father had told her that he would turn her in if she visited him. Mother said father had nothing to do with her abduction of Darrell. Mother had been arrested for shoplifting. A supplemental sheriff's report indicated that when Darrell was asked if mother would give herself shots, he said, "yes, in her hands and neck." Darrell indicated that after mother gave herself a shot, she would sleep a lot and when he would try to wake her up, she would tell him "five more minutes."

Although the social worker sent father letters, he had not contacted her to establish visits.

In July, the court ordered an updated psychological evaluation and a medical examination of Darrell and gave the Department discretion to allow mother telephone contact with Darrell.

On August 5, Darrell was placed in the home of prospective adoptive parents. Darrell said he was happy with his new family and liked playing with his brother and liked his prospective adoptive parents. The foster parents had adopted another child and were committed to adopting Darrell.

On July 30 and August 20, father and paternal aunt visited Darrell, and the visits went well. Mother had telephone contact with Darrell.

Beginning in August, Darrell began weekly individual and family therapy sessions to address his difficulties in adjusting to a new home, his severe hyperactivity, anxiety, and difficulty in focusing and remaining on task. Darrell had problems following directions and was quick to become oppositional and defiant. The prospective adoptive parents were highly motivated to help Darrell through his adjustment period and provide him with a permanent home. Darrell was diagnosed as having posttraumatic stress disorder and depressive disorder.

In September, Darrell underwent a psychological reevaluation by Dr. Rita Collins-Faulkner. During the evaluation, Darrell drew family pictures and referred to mother as “mommy.” Darrell told Dr. Collins-Faulkner, ““I don’t know why I’m not with mommy,”” then he shut down and tended to withdraw. Darrell stated he liked it in the prospective adoptive parents’ home, and if he could not return to mother, he wanted to stay there and be adopted. Dr. Collins-Faulkner found that Darrell’s projectives indicated a significant amount of fear, depression and repressed anger. “He also wants to be connected with his mother, wishes to be reunified with her, be with his family and this may cause him significant distress.” Dr. Collins-Faulkner stated: “There was much evidence of destruction and fear, indicating depression and anxiety that may be the result of having been taken by his mother, replaced back into foster care, and replaced once again.”

In November, the Department reported father had had weekly visits since August 27, and mother had had two telephone contacts with Darrell and written him letters to which the prospective adoptive mother helped him respond. The court found father to be Darrell's presumed father. In December, the Department indicated the visits between father and Darrell had gone well and they were connected and loving with each other and played together.

The prospective adoptive parents indicated their willingness to maintain contact with appropriate members of Darrell's birth family, they had spoken to mother several times over the telephone and felt they were beginning to develop a relationship with her. Darrell reported he would like to live with his prospective adoptive parents, but he would also like to live with mother. Mother continued to be incarcerated for child stealing and petty theft, and her expected release date was January 2005.

During a monitored telephone conversation, mother stated to one prospective adoptive parent, "If I do lose Darrell, I am glad that Darrell is with you." The prospective adoptive parent replied, "It is important to us that you (mother) and Darrell's family be a part of his life. We would like for them to have a continuous relationship with Darrell." The prospective adoptive parent told the social worker that he wished to speak to father to tell him that if the court terminated parental rights, he wished for father to continue to have visits with Darrell.

On November 18, Darrell's therapist reported that in the four months since therapy had begun, she had observed, "a growing attachment between Darrell and the adoptive parents, and Darrell has begun to spontaneously make statements which suggest that he sees himself growing up with this family. He gets along much better with his adoptive brother, and both boys have begun to refer to each other as 'my brother.' Adoption appears to be in Darrell's best interest."

On December 15, the court held the section 366.26 hearing and found by clear and convincing evidence that Darrell was likely to be adopted and that there were no exceptions to termination of parental rights. With respect to father, the court found he

had not established a parental relationship with Darrell, but his relationship was more that of a friendly visitor. With respect to mother, the court stated it believed that while the relationship she had with Darrell during the time she had abducted him might have met the exception, her contact with him since his return had been minimal, and Darrell would not suffer detriment if their relationship were terminated. The court noted: “Even with all the instability and the short period of time that the child has been there [with the prospective adoptive parents], he has made remarkable strides in his stability and development and the foster parents are to be commended for the kind and quality of care that they have given to this child.” The court terminated parental rights.

Mother and father filed timely notices of appeal.

DISCUSSION

I. ICWA Notice

On May 24, 2002, mother’s counsel informed the court mother had Cheyenne Indian heritage. The court ordered the Department to investigate that heritage and provide notice to the Cheyenne tribe and the Bureau of Indian Affairs (“BIA”). On June 17, the social worker sent notice to the BIA in Sacramento, and on February 11 and 12, 2003, the social worker sent notice to the Northern Cheyenne Tribal Council. However, no dependency petition, birth certificate or return receipt were attached to the notices and the notices failed to give the mother’s maiden name or any information about the maternal relatives. In January 2003, the court found there was no ICWA issue because mother was not registered with a tribe.

The parents contend the court erred in finding the ICWA was not an issue and in proceeding without proof of proper notice to the tribe and the BIA.² (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174.)

² Father joined in mother’s briefs.

The juvenile court is charged with carrying out the purposes of and complying with the ICWA. (§ 360.6, subd. (b); Cal. Rules of Ct., rule³ 1439.)

Although mother failed to raise this issue before the juvenile court, ICWA's notice requirements cannot be waived. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.) The Department concedes notice was improper, which requires vacation of orders made without proper notice. (See *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110-111.) Accordingly, we grant the Department's request to reverse and remand the order terminating parental rights (we also reverse the detention and disposition orders) with directions to the court to order the Department to provide the Cheyenne tribe and the BIA with proper notice. (For notice requirements see *In re Karla C.*, *supra*, 113 Cal.App.4th at pp. 175-179; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1214-1215.) If no tribe indicates Darrell is an Indian child, the court should reinstate its findings and orders. Consequently, we consider the other issue raised by the parents that the section 366.26, subdivision (c)(1)(A) exception was applicable.

II. Exception

The parents contend the court erred in terminating parental rights as the evidence showed Darrell had developed a strong parent-child bond with (1) mother during the time he lived with her prior to the dependency proceedings and during the period of time she had absconded with him, and (2) father as father had spent most of Darrell's life with him and was having regular, positive visitation with Darrell.

The section 366.26, subdivision (c)(1)(A) exception to termination of parental rights applies only where a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

³

All rule references are to the California Rules of Court.

Under subdivision (c)(1)(A) of section 366.26, a parent must show “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Although courts have applied a substantial evidence test to the findings under this subdivision, some courts have determined abuse of discretion is the appropriate standard, but noted that the practical differences between the standards are not significant in this situation. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) “‘If there is any substantial evidence to support the findings of the juvenile court, a reviewing court must uphold the trial court’s findings. All reasonable inferences must be in support of the findings and the record must be viewed in the light most favorable to the juvenile court’s order.’” (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 168.)

The parent has the burden of proving that continuing the parent/child relationship will promote the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home or that termination would be detrimental to the child. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) The court examines the exception on case-by-case basis, taking into account the many variables which affect the parent-child bond. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

“The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.” (Fn. omitted.) (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467.)

The parents note father had regular, positive visits with Darrell, but fail to address the court's findings the nature of those visits was that of a friendly visitor and father had not developed a parental relationship with Darrell. "The parent must do more than demonstrate 'frequent and loving contact[,] an emotional bond with the child, or that parent and child find their visits pleasant. Instead, the parent must show he or she occupies a 'parental role' in the child's life.'" (Citations omitted.) (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. The relationship arises from day-to-day interaction, companionship and shared experiences." (Citation omitted.) (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The record indicates father failed to establish such a relationship with Darrell.

The parents rely on *Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958, 974 as support for the proposition the time mother spent with Darrell after she abducted him should be considered in determining if she had a strong parent-child bond with him as the purpose of dependency proceedings is not to punish the parent but to serve the best interests of the child. The parents urge Darrell had a strong bond with mother and note he repeatedly asked to rejoin her after they were separated; they claim Darrell suffered no harm from the time mother absconded with him and mother's criminal act had been properly punished.

In *Katheryn*, Katheryn, the mother, had absconded with her minor child for three years after an abuse petition against her was sustained. The petition was based on allegations the child had been abused by Katheryn's live-in boyfriend and a child friend. During the time Katheryn was absent from the state, the court terminated reunification services, released her appointed counsel and held the section 366.26 hearing in her absence. The social worker testified it was difficult to determine whether the termination of parental rights would be detrimental to the child because the social worker had not

assessed the child's attachment to Katheryn. There was no adoptive home. Although the social worker and counsel for the child requested a continuance, the court denied a continuance and terminated Katheryn's parental rights. The Court of Appeal held the release of counsel was a due process violation and, under the particular circumstances there, set aside certain orders and directed the court to hold a new review hearing. (*Id.*, at pp. 971, 975.)

The parents refer to the court's statement in *Katheryn* that the mother had not abandoned her child and, even though the child had suffered educationally and developed dental anomalies, both problems were remedial, and otherwise the child had no developmental delays. (*Katheryn S. v. Superior Court, supra*, 82 Cal.App.4th at pp. 970-971.) However, in noting Katheryn had not abandoned her child, the Court of Appeal was distinguishing a case relied on by the juvenile court to relieve counsel. (*Ibid.*)

In contrast, Darrell was detained because mother overdosed on heroin and was unable to provide care for Darrell. In the case at bar, mother was involved in three abductions of Darrell. She abducted Darrell from her cousin and had Darrell for about a month in October 1999. The second time, Darrell was given to father by the sibling with whom Darrell had been placed. Darrell's whereabouts were unknown to the court from December 1999 to April 2002. At some point, Darrell ended up with mother. Finally, mother again abducted Darrell from his preschool and had him from February to July 2003. During the time mother had Darrell, the nature of her relationship with him is unknown. However, mother admitted to stealing and shoplifting to support him and sleeping in a car. Darrell reported that mother had given herself shots and would sleep afterwards. The court was being optimistic when it stated that unsupervised relationship might have met the exception.

The Department had found a prospective adoptive home for Darrell and completed an adoption assessment. Furthermore, the reports indicated Darrell had a number of behavioral problems which needed to be addressed and that the prospective adoptive parents were helping him overcome those problems.

Dr. Collins-Faulkner stated that although Darrell wished to be reunited with mother, “There was much evidence of destruction and fear, indicating depression and anxiety that may be the result of being taken by his mother, replaced back into foster care, and replaced once again.” Mother suggests Darrell’s problems were caused by his separation from her. It appears the genesis of Darrell’s problems was mother’s wrongful acts and her absconding with him rather than working with the Department to reunite with Darrell. Mother deprived Darrell of the counseling he needed to address the difficulties revealed by his psychological exam.

Moreover, Darrell’s therapist reported Darrell had a growing attachment to his prospective adoptive parents and had begun to make statements suggesting he saw himself growing up with that family. The therapist concluded: “Adoption appears to be in Darrell’s best interest.” Darrell’s prospective adoptive parents were highly motivated to help him adjust and provide a permanent home for him and expressed a willingness to let the parents continue to visit.

Thus, there was substantial evidence Darrell’s relationship with his parents did not outweigh the benefit of a permanent home, i.e., that adoption was in Darrell’s best interest.

DISPOSITION

The detention and disposition orders and the order terminating parental rights are reversed and the matter is remanded to the juvenile court with directions that within 10 days of the remittitur, pursuant to the ICWA and rule 1439, the Department provide the appropriate Cheyenne tribe or tribes and the BIA with proper notice, which should include the mother’s and maternal grandmother’s maiden names and other pertinent information, of the pending proceedings and that the Department file proof of the receipt of such notice by the tribes, along with a copy of the notices and any responses, with the juvenile court.

If, after notice is properly given, no tribe responds indicating Darrell is an Indian child within the meaning of the ICWA, the court shall reinstate the detention, disposition and termination of parental rights orders. If a tribe determines Darrell is an Indian child, the juvenile court shall conduct the detention and disposition hearings applying the provisions of the ICWA, section 360.6 and rule 1439.

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.